MOHD. ARSHAD SALLEH *a*

v.

YASIN IBRAHIM & ORS.

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[ORIGINATING SUMMONS NO. 24-1389-89] *b*
24 FEBRUARY 1991

LAND LAW: *Alienation of incidents - State land - Banci sewa - Death of original owner of banci sewa - Legal status - Administration of deceased estate - Provisional titles - Dealings - Restrictions - True owner - Persons who are in occupation of the land - Licence or consent of owner - Locus standi - Order for possession - National Land Code 1965, parts 6, 7, 8, 13, 14, 22, 215, 444 - Kedah Provisional Titles (Transitional) Rules 1967, Rules 12, 13.* *c*

M was granted a Banci Sewa in respect of the said land which was however not alienated to him during his lifetime. After M's death, the Collector of Land Revenue granted the plaintiff P letters of administration under s. 13 of the Small Estates Distribution Ordinance 1955; the grant was limited to collecting proceeds of M's properties and settling of M's debts. There is in existence a certificate dated 7 December 1964 saying that P, as administrator of M's estate, is a registered proprietor of the 'banci sewa'. The Collector applied for distribution of the said land to beneficiaries of M's estate but this was cancelled when B objected to the distribution of the land. P applied under O. 89 of Rules of the High Court 1980 for recovery of possession of the said land from D1, D2 and D3. *d*

B's wife, D3 alleged that B's father K had cleared the said land and that he had built a house in which K's grandson, the 1st defendant, D1 now lives. Further, it is alleged that B cleared and developed the land and built houses for D2 and D3 who contend that as the land was state land which had not as yet been alienated, the State Authority is the proper authority to resolve the question of who is entitled to be alienated the said land; they also contend that P has no *locus standi.* *e*

The question was whether M or P gave the defendants or the persons through whom they claim licence to occupy the land, or consented to their staying on the land. *f*

Held:

[1] (a) The National Code and the rules made thereunder now govern the land law in the State of Kedah relating to the provisional titles;

(b) these provisional titles were creatures of the Land Enactments prior to 1 August 1935 and were given continued life by Land Enactment No. 56, s. 2, which included land occupied under banci sewa entry and for the limited purpose of Chapter IV, banci sewa were deemed included within the meaning of a "documentary of title" ; *g*

(c) the Land Enactment No. 56 was repealed by the National Land Code 1965 (NLC) which made transitional rules as to the provisional titles, which by definition under s. 445 of the NLC, included banci sewa; *h*

(d) land held under a banci sewa, under r. 13 of the Transitional Rules, is subject to Pts. 6, 7 and 8 of the NLC as if it is alienated land.

[2] (a) with the tangible attributes of land occupied under Banci Sewa arising under rr. 12 and 13, such land is state land which was given out for occupation to a person before 1 August 1935 and that such land has been provisionally marked for alienation to him; *i*

(b) to all intents and purposes, bearing in mind r. 12, the person given a Banci Sewa is the true owner of the land and what is required of him to obtain a qualified title (or grant or Mukim Grant) is to comply with r. 15;

(c) if the owner has died the administrator of his estate steps into his shoes and in the present case the plaintiff was granted letters of administration under the Small Estates Distribution Ordinance 1955; therefore P has *locus standi* to act for the estate of the deceased.

[3] (a) the land in question is not state land simpliciter. It was given on a Banci Sewa to M. It was not given to the defendants or to persons through whom they claim;

(b) there is no relationship whatsoever between the defendants and the persons through whom they claim on one hand and the state on the other in so far as the said land is concerned;

(c) the land is not the defendants' and they have not shown that they had entered into and remained in occupation of the land with the licence or consent of the owner of the Banci Sewa, M or of P as administrator of his estate - *Bohari's* case distinguished.

[P's order for possession granted.]

Case referred to:
Bohari bin Taib and 5 Ors. v. Pengarah Tanah dan Galian Selangor [1991] 1 CLJ (Rep) 48

Legislation referred to:
Kedah Provisional Titles (Transitional) Rules 1967, rr. 12, 13
National Land Code 1965, ss. 3, 5, 42, 77(2)
Small Estates (Distribution Ordinance) 1955, s. 13

For the plaintiff - Aishah; M/s. Aishah Jaafar & Associates
For the defendants - Kartar Singh; M/s. Kartar Singh Dhaliwal & Co.

JUDGMENT

KC Vohrah J:

This is an application by way of summary proceedings under O. 89 to recover possession of land. There is also a prayer for a restraining order but it is obviously a misconceived prayer.

The application to recover possession of land is by Mohd. Arshad bin Salleh, administrator of the estate of one Mat Arshad bin Hj. Dollah. The principal prayer is for an order that he recovers possession of Plot No. 120, Mukim Bukit Raja, Kedah held under a provisional title of "Banci Sewa", Mat Arshad having been the registered owner of the land under a "Banci Sewa".

The grounds given in the application are "that Mohd. Arshad bin Salleh the Administrator of the estate of Mat Arshad bin Hj. Dollah is entitled to possession and that the occupiers are in occupation without consent." The affidavit in support of the application is dismally short on the material facts necessary for the application.

Counsel for the defendants, with his usual candour, has filed 2 affidavits, one by the 3rd defendant and another by the headman of the village where the said land is located, which disclose that the three defendants are in occupation of the said land. Several other matters have also been raised in these 2 affidavits and the plaintiff has filed a supplementary affidavit in reply.

What emerges from the 4 affidavits filed in this case is this. Mat Arshad bin Haji Dollah was granted a "Banci Sewa" in respect of a piece of state land, Plot 120, Mukim Raja, Kedah. This lot, however, was not alienated to him during his lifetime. It is not known when he died but after his death, on 27 June 1964, the Collector of Land Revenue Pendang granted, under s. 13 of the then Small Estates Distribution Ordinance 1955, to the plaintiff letters of administration, the grant being limited to the collecting or the gathering of proceeds as well as to the taking care of the properties of the deceased and for the settling of the debts of the deceased according to order of the Collector of Land Revenue. The schedule to the grant shows the property of the estate of Mat Arshad as being a piece of paddy land held under Banci Sewa, No. 120, Mukim Bukit Raya. There is a certificate dated 7 December 1964 by the Land Officer Pendang that Mohd. Arshad bin Salleh (the plaintiff) in the capacity of administrator is "registered as proprietor" of the "Banci Sewa".

The application to the Collector for distribution of the said land to beneficiaries of the estate of the deceased was cancelled when one Bakar, now deceased, objected to the distribution of the land.

What is alleged by the 3rd defendant, wife of the said Bakar and not disputed by the plaintiff, is that Bakar's father, Kadir bin Hj. Idris, had cleared the said land and that he had a house on it. Kadir's grandson, the 1st defendant, now lives in the house. When Kadir died his son, the said Bakar, continued clearing the land and developed it for paddy cultivation and he built another house on the land and the 3rd defendant and her daughter, the 2nd defendant, now live in the house. The defendants argue that the said land is state land; that the land has yet to be alienated; and that the State Authority is the proper authority to resolve as to who is entitled to be alienated the land and they say the recent Supreme Court decision in *Bohari bin Taib & 5 Ors. v. Pengarah Tanah dan Galian Selangor*, [1991] 1 CLJ (Rep) 48 is in their favour. The defendants also argue that the plaintiff has no *locus standi*.

What has to be borne in mind is that the National Code (Act 56 of 1965) and the rules made thereunder now govern the land law in the State of Kedah relating to the provisional titles. These provisional titles were creatures of Land Enactments which were in force prior to 1 August 1935 (the date on which the Kedah Land Enactment No. 56 came into force). The Land Enactment No. 56 continued to give life to these provisional titles; in s. 2 specific references were made to these provisional titles in respect of state land which included land occupied "under permit, banci sewa entry, Surat Akuan or under a licence for temporary occupation"; and a surat akuan, permit and banci sewa for the limited purposes of Chapter IV of the Land Enactment relating to conditions and obligations which could be imposed on state land were deemed included within the meaning of a "document of title."

The National Land Code (the Code) came into force on 1 January 1966 (see s. 3 of Code and LN 477/1965) and it repealed, *inter alia*, under s. 438(1) read with the Eleventh Schedule thereof, Land Enactment No. 56 of the State of Kedah on the same date. Transitional rules relating to provisional titles referred to in the Land Enactment No. 56, titled the Kedah Provisional Titles (Transitional) Rules 1967 (KPU 8/1967) (the Rules) were made under s. 445 of the Code. Under r. 2 of the Rules, a "Banci Sewa" is included in the definition of "Provisional Title" and under r. 12 "Banci Sewa" is defined to mean a document "evidencing ownership issued under the provisions of any Land Enactment in force prior to the 1 August 1935 (date of coming into force of Land Enactment No. 56)."

For the purposes of this case what is important is r. 13 which reads:

> Land occupied under permit or Banci Sewa shall be deemed to be state land but for the purposes of Parts Six, Seven, Eight, Thirteen, Fourteen and Twenty-two of the Code shall be deemed to be alienated land.

Part Six of the Code deals with rent due to the State Authority on alienated land. Parts Seven and Eight fall under Division III of the Code relating to the incidents of alienated land. Part 7 relates to conditions and restrictions in interest in respect of alienated land. Part Eight deals with forfeiture of the land for non-payment of rent or breach of condition. Thus land held under a Banci Sewa, under r. 13, is subject to these 3 Parts as if it is alienated land.

Part Thirteen of the Code relates to provisions on "dealings" in alienated land. A "dealing" is defined under s. 5 of the Code as transactions:

> with respect to alienated land effected under powers conferred by Division IV of the Code and any like transactions effected under the provisions of any previous land law, but does not include any caveat or prohibitory order.

Part Thirteen makes provisions with those dealings capable of being effected under the Act with respect to alienated land and interests thereon and with the persons capable of taking thereunder. It also makes provisions, *inter alia*, as regards the proper instruments to be used, their contents, their execution and their registration. Part Fourteen of the Code makes provision, *inter alia*, as to what may be transferred and with the restrictions on the exercise of powers in respect of, *inter alia*, alienated land. Under s. 215, falling under Part Fourteen, the transfer of any land shall be effected by an instrument in Form 14A. Section 215(2) states that the title of the transferor shall pass to and vest in the transferee upon the registration of any such transfer, together also with the benefit of any registered instrument then enjoyed in the land. Thus with r. 13 of the Rules a Banci Sewa is clothed with the attributes of alienated land for the purposes of Parts Thirteen and Fourteen and can be the subject matter of a "dealing" and its transfer is effected by an instruments under Form 14A and it follows that the provisional title of the transferor, the Banci Sewa, shall pass to and vest in the transferee.

As for Part Twenty-two of the Code it contains provisions relating to the transmission of alienated land on the death of the proprietor of the land or on his bankruptcy. Rule 13 of the Rules provides for land occupied under Banci Sewa to be deemed as alienated land for the purposes of Part Twenty-two of the Code. In other words the land by an owner under Banci Sewa may be registered in the name of the personal representative to be held in trust for the beneficiaries on the death of the owner.

To sum up, with the tangible attributes of land occupied under Banci Sewa arising under rr. 12 and 13 of the Rules, one may say that such land is state land which was given out for occupation to a person before 1 August 1935 (the date on which the now repealed Kedah Land Enactment came into force) and that such land has been provisionally marked for alienation to him. The provisions in the Code relating to the rent due on and other incidents attaching to alienated land and forfeiture of the land to the State Authority apply to a Banci Sewa land as if the state land had been alienated. And the land may be bought and sold as if it is alienated land and it is also considered as an asset of the estate of a deceased and can be transmitted to a personal representative who will hold it on trust for the beneficiaries of the estate. To all intents and purposes, bearing in mind r. 12, the person given a Banci Sewa is the true owner of the land and what is required of him to obtain a qualified title (or grant or Mukim Grant) is to comply with r. 15. If the owner has died the administrator of his estate steps into his shoes and in the present case the plaintiff was granted letters of

administration under the Small Estates Distribution Ordinance 1955. The plaintiff has *locus standi* to act for the estate of the deceased. So the argument that the plaintiff has no *locus standi* to sue in this case must fail.

As for the argument that since the land is state land the state must resolve the issue the argument cannot succeed as the land in question is not state land **simpliciter**. It was given on a Banci Sewa to Mat Arshad bin Hj. Dollah. It was not given to the defendants or to persons through whom they claim. There is no relationship whatsoever between the defendants and the persons through whom they claim on one hand and the state on the other in so far as the said land is concerned. The land is not theirs and they have not shown that they had entered into and remained in occupation of the land with the licence or consent of the owner of the Banci Sewa, Mat Arshad bin Haji Dollah, deceased, or of the plaintiff as administrator of his estate.

With what I have stated above, with respect, I do not think the case of *Bohari bin Tambi and 5 Ors. v. Pengarah Tanah dan Galian Selangor*, [1991] 1 CLJ (Rep) 48 supports the argument of the defendants that there are triable issues. In that matter the case of the parties in occupation of state land against the Pengarah Tanah dan Galian was that they were in occupation of the land with the consent of the state prior to the grant of temporary occupation licences from 1981 to 1983, this being part of the chain of events supporting the existence of an approval of alienation of the lands to them by the State Authority under s. 42 of the Code. They argued that pending issue of titles under s. 77(2) they were entitled to remain on the land not as squatters but as of right. The Supreme Court held there were triable issues and held that the case should not have been dealt with summarily under O. 89. Here in this case, as stated earlier, there is no *nexus* between the defendants and the persons through whom they claim on the one hand and the state on the other in respect of the land. The state had given the land to Mat Arshad bin Haji Dollah to be held under a provisional title, Banci Sewa, and when he died this land was transmitted to the plaintiff as administrator. The question is whether Mat Arshad or the plaintiff as the administrator of his estate gave the defendants or the persons through whom they claim licence to occupy the land or consented to their staying on the land. The answer is in the negative as there is nothing in any of the affidavits showing that the defendants or the persons through whom they claim are occupying the land with the licence or consent of Mat Arshad or the plaintiff as the administrator of Mat Arshad's estate. In fact the defendants deny that Mat Arshad was owner of the land. In other words there are no triable issues in the case. I therefore make an order for possession. I have already pointed out the shortcomings in the application and I disallow the plaintiff the costs of this application.

Also found at [1991] 2 CLJ 1009